Supreme Court, U.S.
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No. 99-1951

IN THE

Supreme Court of the United States

SANDRA BROWN, *et al.*,

Petitioners,

v.

PAYDAY CHECK ADVANCE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PAYDAY CHECK ADVANCE, INC.

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STATEMENT PURSUANT TO RULE 29.6

Payday Check Advance, Inc. ("Payday") is an Illinois corporation incorporated on April 18, 1997 and adopted the assumed name of Payday Express on July 7, 1997. Payday is a subsidiary of SHC Corp., an Illinois corporation. SHC Corp. owns 80% of Payday, and either Argent Holdings, Inc. or Argent Enterprises, Inc. owns 20% of Payday (the owner of the 20% interest is in dispute).

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REASONS FOR DENYING THE WRIT

Petitioners have not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. They cannot contend that the decisions in the Seventh Circuit have created a split of authority on the issue presented. Rather, Petitioners attempt to invoke this Court's authority by asking it to correct errors supposedly committed in the district courts and the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit"), and to address a question about the plain reading of certain Truth in Lending Act provisions dealing with the right to receive statutory damages. For the reasons explained herein, the Seventh Circuit opinions were proper in all respects. Accordingly, Respondent Payday Check Advance, Inc. respectfully urges the Court to deny the Petition for *Writ of Certiorari* because the Petitioners have not demonstrated a compelling reason to do otherwise.

Petitioners have repeatedly addressed the statutory damages issue before a number of federal district court judges and the Seventh Circuit. The position advanced by Petitioners before these judges and the Seventh Circuit was rejected for the reasons concisely stated in the opinions found in the Petition's Appendices. There is nothing new or novel raised by the Petitioners in their Petition and, despite Petitioners' assertion to the contrary, there are no opinions conflicting with the cases decided by the Seventh Circuit. Finally, the analysis and reasoning applied by the Seventh Circuit to the pending claims do not conflict with, abrogate, or weaken the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"). Accordingly, the opinions of the Seventh Circuit reflect the intended application of TILA to Petitioners' claim for statutory damages and should remain undisturbed.

I.

THE SEVENTH CIRCUIT'S OPINIONS APPROPRIATELY ADDRESS PETITIONERS' CLAIMS FOR STATUTORY DAMAGES UNDER TILA AND DO NOT CONFLICT WITH TILA.

In their respective complaints, Petitioners assert that Payday's TILA disclosures were not "conspicuously segregated" from all other terms, that the term "total of payments" was not included (instead the term "total of payment" was used), and that descriptive explanation of the disclosed terms were not provided.

The alleged violations of TILA raised by Petitioners in *Brown v. Payday Check Advance, Inc.* and *Mitchem v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000) were determined to be transgressions of TILA section 1632(a) ("more conspicuous"), section 1638(b)(1) ("conspicuously segregated"), and section 1638(a)(8) ("descriptive explanations"). Petitioners made no claim for any actual damages for these alleged violations, but instead sought only the recovery of statutory damages and attorneys fees. Damages recoverable under TILA are governed by 15 U.S.C. § 1640. The recovery of statutory damages under section 1640(a) is expressly limited by the contents of an unnumbered paragraph following section 1640(a)(4), which states:

> *In connection with the disclosures referred to in section 1638 of this title*, a creditor shall have liability determined under paragraph (2) *only* for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of "amount financed"),

> (3), (4), (5), (6) or (9) of section 1638(a) of this title . . .

15 U.S.C. § 1640(a) (emphasis added).

The Seventh Circuit, in reviewing the entirety of section 1640(a) vis-à-vis Petitioners' entitlement to a claim for statutory damages, correctly observed that section 1640(a), as drafted, permitted statutory damages *only* for failing to comply with the requirements of the enumerated sections, and not for other transgressions. None of Petitioners' alleged TILA violations fall within the enumerated sections:

- Failure to emphasize the typeface of "finance charge" and "annual percentage rate" — section 1632(a);

- Omission of descriptive explanations — section 1638(a)(8); and

- Appearance of extra matter in the federal box — section 1638(b)(1).

Brown, 202 F.3d at 989, 990.

The Seventh Circuit concluded that violations of these enumerated sections would not permit recovery under section 1640(a), since section 1640(a) specifically excludes these violations from claims for statutory damages. The damage limiting paragraph of section 1640(a) states that "[i]n connection with the disclosures referred to in section 1638 of this title", statutory damages shall be awarded "only for failing to comply with" the specifically enumerated provisions of sections 1635 and 1638. The "conspicuously segregated" requirement of 1638(b)(1) is a provision "in

connection with the disclosures referred to in section 1638". Section 1638(b)(1) is not listed as a provision permitting recovery of statutory damages under section 1640(a). The same analysis is applicable with respect to "descriptive explanations" of section 1638(a)(8) which, likewise, is not listed as a provision permitting recovery of statutory damages under section 1640(a). Finally, because all of the formal details prescribed by section 1632 are "in connection with" disclosures under 1638, omission from the list means no statutory damages. *Brown*, 202 F.3d at 992.

The plain reading of section 1640(a) remains unchallenged by Petitioners, who instead offer a "back door" argument under section 1638(a)(3) and section 1638(a)(4). This argument was completely rejected by the Seventh Circuit as an effort to rewrite section 1640(a) into a section of "universal inclusion", when Congress plainly intended to include some and exclude other violations from claims for statutory damages. *Brown*, 202 F.3d at 991. As the Seventh Circuit noted, if Congress had intended to permit plaintiffs to recover statutory damages for violations of section 1632(a), it could have so specified; and, because the "more conspicuously" disclosure provision in section 1632(a) was added at the same time as the provision in section 1640(a) limiting statutory damages, it is unlikely that the failure to include section 1632(a) violations was an oversight.

Petitioners have also urged that the disclosure requirements of Federal Reserve Board Regulation Z, 12 C.F.R. part 226 ("Regulation Z") are incorporated into the "more conspicuously" requirements of section 1638(a)(3) and section 1638(a)(4) and, therefore, statutory damages are available for these violations. However, the district courts and the Seventh Circuit have also rejected this argument since

the 1980 TILA amendments made the Regulation Z "more conspicuously" requirement part of TILA at section 1632(a). At the same time, Congress declined to include section 1632(a) violations in those sections for which statutory damages would be recoverable.

The Seventh Circuit went on to note in *Brown* that the considered portion of section 1640(a) was added to TILA by Congress in 1980 to curtail awards for "picky and inconsequential formal errors". *Brown*, 202 F.3d at 991. Nothing suggested by Petitioners changes the fact that the claimed violations were not significant and thus fall outside the provisions of section 1640(a) permitting recovery of statutory damages.

Petitioners' citation to *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999) offers scant support to their position because the court engaged in a legislative analysis that was neither well-founded nor logically consistent with the plain language of section 1640(a). For example, the court relied on pre-1980 TILA amendment cases to support an analysis that statutory damages under section 1640(a) are available for even "minute deviations from the requirements of TILA . . .". *Johnson*, 82 F. Supp. 2d at 275. With this flawed premise, the district court, in *Johnson*, completely departed from the language and intent of section 1640(a) when it ignored the fact that the disclosures in issue were section 1638 disclosures, outside of the enumerated section 1638 provisions which permit recovery of statutory damages. Finally, the court justified its departure from a plain reading of section 1640(a) by reasoning that since section 1632(a) precedes section 1638, Congress intended violations of 1632(a) to be treated as violations of section 1638(a)(3) and 1638(a)(4). *Johnson*, 82 F. Supp. 2d at 276. This,

however, is not how section 1640(a) reads, nor was the court's presumption well-founded. *See Brown*, 202 F.3d at 991, 992.

II.

PETITIONERS MISAPPLY THE HOLDINGS IN CASES CITED IN THEIR PETITION IN ORDER TO BOLSTER THEIR DESIRED INTERPRETATION OF SECTION 1640(a).

Petitioners have cited two cases in their Petition which they contend support their right to statutory damages for the subject TILA violations. In *Dixey v. Idaho First National Bank*, 677 F.2d 749 (9th Cir. 1982), where Petitioners assert that the court "awarded statutory damages or upheld claims for violations of the 'more conspicuousness' requirement" (Petition at 22), was a case decided before the 1980 TILA amendments. The court, in that case, observed that under the TILA amendments suits to impose penalties for minor violations may no longer arise. *Id.* at 753. In *Herrera v. First Northern Savings & Loan Association*, 805 F.2d 896 (10th Cir. 1986), the court never addressed section 1640(a), but instead focused on section 1640(c) which was the provision raised by defendant in seeking to avoid liability.

Finally, in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), cited by Petitioners for the proposition that the failure to make TILA disclosures subjects a lender to statutory damages, has nothing whatsoever to do with the specific issue decided by the Seventh Circuit in this case. Instead, *Beach* is a rescission case addressing when the right to rescind is extinguished. Moreover, in *Beach*, plaintiffs asserted violations of sections 1638(a)(3) and 1638(a)(4), both of

which permit recovery of statutory damages. *Beach* is instructive in that this Court, in rejecting an expansive statutory reading of TILA by plaintiffs, noted that "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion". *Beach* at 418. So, too, is the case here where under section 1640(a) certain violations were remediable by the right to statutory damages and others not. This analysis was correctly made by the district court and the Seventh Circuit.

III.

THE SEVENTH CIRCUIT'S OPINIONS DO NOT CONFLICT WITH ANY OTHER FEDERAL CIRCUIT COURT OPINIONS.

The Petitioners' statement that there is a conflict between the Seventh Circuit and Tenth Circuit concerning the recovery for statutory damages under section 1640(a) for violations of section 1632(a) is unsupportable. The Petitioners advanced the same argument before the Seventh Circuit, adding that *Dixey v. Idaho First National Bank*, 677 F.2d 749 (9th Cir. 1982) was likewise in conflict with *Brown v. Payday* — a position now abandoned. The Seventh Circuit correctly noted that the case in alleged conflict, *Herrera v. First Northern Savings & Loan Association*, 805 F.2d 896 (10th Cir. 1986), did not discuss the effect of section 1640(a), but instead dealt with the impact of section 1640(c), which avoids all liability where the complained of acts are not intentional or result from a bona fide error. *Herrera* at 900. Therefore, there are no conflicting court opinions which would compel that this Court review the opinions of the Seventh Circuit.

Finally, Petitioners argue that there was something unfair about the Seventh Circuit's decisions, and that these decisions may impact future claims for statutory damages and attorneys fees. These arguments are not well-grounded and do not amount to statements of "compelling reasons" that are a prerequisite for issuance of a *writ of certiorari*. *See* S. Ct. Rule 10. The Seventh Circuit's well-reasoned opinion in *Brown* pointed out that Congress enacted the TILA amendments in 1980 to curtail damages for picky and inconsequential formal errors, and that "[i]t would hardly be appropriate to undo Congress' decision by reading matters of form into the substantive provisions for which statutory damages are not authorized." *Brown* at 991.

CONCLUSION

For all the foregoing reasons, Respondent Payday Check Advance, Inc. respectfully requests that this Court deny the Petition for *Writ of Certiorari*.

Respectfully submitted,

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